

84-257 (2)

Office - Supreme Court, U.S.  
FILED

SEP 20 1984

ALEXANDER L. STEVAS  
CLERK

No. \_\_\_\_\_

IN THE  
SUPREME COURT  
OF THE UNITED STATES  
October Term, 1984

THE CITY OF LOS ANGELES, a  
Municipal Corporation,  
ROBERT F. GALLEGOS, JAN J. HARRIS,  
and DWAYNE T. MERRILL,

Petitioners,

vs.

LEROY BUTTLER, DONALD BUTTLER,  
and VICTOR BUTTLER,

Respondents,

OPPOSITION TO PETITION FOR WRIT  
OF CERTIORARI TO THE  
COURT OF APPEAL OF  
THE STATE OF CALIFORNIA,  
SECOND APPELLATE DISTRICT

ISAAC & MARKS  
A Professional Corporation  
GODFREY ISAAC  
ROSALIND MARKS  
315 S. Beverly Dr., #300  
Beverly Hills, CA 90212  
(213) 273-1866  
Attorneys for Respondents.

BEST AVAILABLE COPY

7490

TOPICAL INDEX

	<u>PAGE</u>
TABLE OF AUTHORITIES. . . . .	ii
TABLE OF APPENDICES . . . . .	v
OPINION BELOW . . . . .	2
JURISDICTION. . . . .	2
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED . . . .	
STATEMENT OF THE CASE . . . . .	4
SUMMARY OF ARGUMENT . . . . .	4
ARGUMENT. . . . .	9
CONCLUSION. . . . .	34

TABLE OF AUTHORITIES

<u>CASES</u>	<u>PAGE</u>
<u>Bennett v. Letterly,</u> 74 Cal.App.3d 901, 141 Cal.Rptr. 682 (1977) . .	17
<u>Carr v. United States,</u> 422 F2d 1007 (4th Cir. 1970) . . . . .	5, 13
<u>Christin v. Superior Court,</u> 9 Cal. 2d 256, 71 P2d 205 (1937) . . . . .	22
<u>Clark v. Mechanics' Amer.</u> <u>Nat. Bank,</u> 282 F 879 (8th Cir. 1922) . .	14
<u>Cost v. Ash,</u> 422 U.S. 66, 95 S.Ct. 2080, 45 L.Ed. 2d 26 (Cal. 1975) .	25
<u>Crowder v. Captial</u> <u>Greyhound Lines,</u> 169 F2d 674 (D.C. Cir. 1948) . . . . .	26
<u>Cruz v. General Motors</u> <u>Corp.,</u> 308, F. Supp. 1052 (S.D.N.Y. 1970) . . . . .	5

<u>CASES (Continued)</u>	<u>PAGE</u>
<u>Estate of Madison,</u> 26 Cal. 2d 253, 159 P2d 630 (1945) . . . . .	17
<u>Fanin Corp. v. Superior Court,</u> 36 Cal.App.3d 745, 111 Cal.Rptr. 920 (1974) . . .	23
<u>Gross v. Williams, et al.,</u> 149 F2d 84 (8th Cir. 1945) .	26
<u>Kaiser Foundation Hospitals v. Superior Court,</u> 185 Cal.App. 2d 177, 8 Cal.Rptr. 781 (1960) . . .	28
<u>Pacific Greyhound Lines v. Superior Court,</u> 28 Cal. 2d 61, 168 P2d 665 (1946) . . . . .	passim
<u>Rauer's Law Etc. v. Higgins,</u> 76 Cal.App.2d 854, 174 P2d 450 (1946) . . . . .	29
<u>Tabor v. Miller,</u> 389 F2d 645 (3rd Cir. 1968).	26
<u>Thorpe v. Housing of City of Durham,</u> 393 U.S. 269, 89 S.Ct. 518, L.Ed. 2d 474 (1969). . . . .	34

<u>CASES (Continued)</u>	<u>PAGE</u>
<u>U.S. v. Thirty Seven</u> <u>Photographs,</u> 402 U.S. 363, 91 S.Ct., 1400, 28 L.Ed. 2d (Cal. 1971) reh. <u>denied</u> , 403 U.S. 924. . . . .	25
<u>Zitomer v. Holdsworth,</u> 449 F2d 725 (3rd Cir. 1971). . . . .	18-21
STATUTES	
California Code of Civil Procedure § 583(b) . . . . .	passim
Soldiers' and Sailors' Civil Relief Act, (Public Laws, ch. 888, § 205, 54 stat. 1181). . .	5, 10, 18
Soldiers' and Sailors' Civil Relief Act, 50 U.S.C. App. § 525 . . .	passim

TABLE OF APPENDICES

APPENDIX A:

Opinion of the California  
Court of Appeal,  
Second Appellate District. A-1

APPENDIX B:

Soldiers' and Sailors'  
Civil Relief Act,  
Public Laws Ch. 888,  
§ 205, 54 1181. B-1

APPENDIX C:

Soldiers' and Sailors'  
Civil Relief Act,  
50 U.S.C. App. § 525. C-1

APPENDIX D:

California Code of  
Civil Procedure § 583(b) D-1



No. \_\_\_\_\_

IN THE  
SUPREME COURT OF THE UNITED STATES  
October Term, 1984

THE CITY OF LOS ANGELES, a Municipal  
Corporation, ROBERT F. GALLEGOS, JAN  
J. HARRIS and DWAYNE T. MERRILL,

Petitioners,

vs.

LEROY BUTTLER, DONALD BUTTLER and  
VICTOR BUTTLER,

Respondents.

---

OPPOSITION TO WRIT OF CERTIORARI TO THE  
COURT OF APPEAL OF THE STATE OF  
CALIFORNIA, SECOND APPELLATE DISTRICT

---

The Respondents, LEROY BUTTLER,  
DONALD BUTTLER and VICTOR BUTTLER,  
respectfully submit that the judgment  
and opinion of the Court of Appeal of  
the State of California, Second Appellate  
District filed in this case on March 22,  
1984, is correct and in accordance with

settled principles, and should not be further reviewed.

Further, Respondents respectfully request that the Petition for Writ of Certiorari be denied.

OPINION BELOW

The Opinion of the Court of Appeal of the State of California, Second Appellate District is reported at 153 Cal.App.3d 520, 200 Cal.Rptr. 372 (1984), and is attached hereto as Appendix A.

STATEMENT OF JURISDICTION

The decision of the Court of Appeal herein is correct, and in accordance with settled principles and should not be further reviewed. Respondents received the Petition for Writ of Certiorari on August 20, 1984, and are

timely filing this Opposition of the  
Petition for Writ of Certiorari.

CONSTITUTIONAL PROVISIONS

AND STATUTES INVOLVED

1. Soldiers' and Sailors'

Civil Relief Act, § 525

Public Laws, ch. 888,

§ 205, 53 stat. 1181. Appendix B-1

Soldiers' and Sailors'

Civil Relief Act, § 521

§ 525 (50 U.S.C. App.

§ 525, §521) Appendix C-1

2. California Code of

Civil Procedure,

§ 583(b) Appendix D-1

STATEMENT OF CASE

Respondents hereby incorporate by reference as though fully set forth herein the facts set forth in the Appellate Opinion herein. (Appendix A-3 - A-7)

SUMMARY OF ARGUMENT

The Appellate Court's opinion is correct. The Court held that the language of § 525 of the Relief Act, the tolling provision, governs time limitations such as California C.C.P. § 583(b) brought by military service-people. The purpose of § 525 is to protect the rights of members of the military who are away from home defending our Nation and enable them to devote all their energy to our Nation's

defense without the worries and distractions attendant to litigation.

Cruz v. General Motors Corp., (308 F. Supp. 1052 (S.D.N.Y. 1970), Carr v. United States, 422 F2d 1007 (4th Cir. 1970) The language of § 525 does not use the words "statute of limitations" (Public Laws, ch. 888, § 205, 54 stat. 1181) although as the Court noted, this phrase was surely in the lexicon of Congress. However, Petitioners argue that this Court should ignore the actual words of Congress and instead follow a West's publisher's headnote which appears in the Annotated version of the Relief Act (Petition, at p. 15) The language Congress chose, "any period . . .

limited by the law . . . for the bringing of any action or proceeding in any court . . ." is broad enough to include a law requiring dismissal unless an "action is brought to trial within five years . . ." (C.C.P. § 583). Importantly, it is during the period between filing the Complaint and bringing the action to trial that the "worries and distractions" of litigation commonly arise necessitating the protection of § 525. The court held there was no rational basis for applying § 525 to limitation periods for initiating an action but not applying it to a limitation period for bringing an action to trial. Moreover, to hold otherwise would discourage people who have already filed

lawsuits from enlisting in the military.

The Appellate Court's interpretation of § 521 of the Relief Act is not in conflict with other Federal Court of Appeal decisions. The settled law is that § 521 mandates a postponement of trial unless the ability of the military serviceperson to prosecute or defend is not materially affected by his or her absence.

Pacific Greyhound Lines v. Superior  
Court, 2 Cal 2d 61, 168 P2d 665 (1946)  
Petitioners do not cite any Federal Court of Appeal decisions which alter or modify this standard. Moreover, contrary to Petitioners' argument, it is undisputed that the fact that a military serviceperson does not

formally apply for a stay pursuant to the Relief Act does not preclude a Court from later considering, for purposes of C.C.P. § 583 (b), whether a stay would have been mandatory, had it been applied for. Pacific Greyhound, supra.

Pursuant to § 525 of the Relief Act, C.C.P. § 583 (b) was tolled, and the suspended time period cannot be retroactively extinguished.

The Appellate Court's decision neither abrogates the function of § 521, nor the purposes of § 525; it simply recognizes and affords the rightful protections to military servicepeople who may also be involved in litigation at home.

ARGUMENT

I.

THE DECISION OF THE COURT  
OF APPEAL IS CORRECT AND  
SHOULD NOT BE FURTHER  
REVIEWED.

A.

The Appellate Court's appli-  
cation of section 525 of the  
Relief Act was proper.

Petitioners contend that § 525 of the Relief Act applies only to statutes of limitations, and not any other time limitations. Yet, Petitioners do not cite one case, law or statute to substantiate this claim. The sole support for this contention is a West's publisher's headnote which appears in the

annotated version of the Relief Act which is in the Annotated United States Code. The Relief Act itself contains no such wording or limitation. (See Public Laws; Ch. 888, § 205 (54 Stat. 1181; Appendix B-1.) The Appellate Court specifically pointed out this vital distinction.

The Court noted:

"The phrase, 'statute of limitation' appears in a headnote to section 525 of West's United States Code Annotated (1981) at page 291. The phrase does not appear in the Act itself. (See Public Laws; Ch. 888, § 205 (54 Stat. 1181.); 153 Cal.App.3d 520, 200 Cal. Rptr., 372 (1984) (footnote 3; Appendix A13 - A14)

The Court went on to find:

"We find no rational basis for applying section 525 of the Act to limitation periods for initiating an

action but not applying it to the limitation period for bringing an action to trial. The language of section 525 does not use the words 'statute of limitations' although this phrase was surely in the lexicon of Congress in 1940. The language Congress chose, 'any period . . . limited by any law . . . for the bringing of any action or proceeding in any court . . . ' is broad enough to include a law requiring dismissal unless an 'action is brought to trial within five years'. . ."  
(Code of Civil Procedure, § 583(b).) (153 Cal.App.3d 520, 200 Cal. Rptr. 372 (1984); (Appendix A13 - A14)

Inexplicably, in the face of the written words of the Relief Act itself, and despite the distinction specifically noted by the Appellate Court, Petitioners choose to ignore the clear difference between the actual words of the Relief Act and

the West's annotated headnote which does not even appear in the Relief Act. Instead, Petitioners erroneously state that the Appellate Court "while admitting that the phrase 'statutes of limitation' appears in the title of § 525 . . . , the Court conveniently ignored the fact that a statute's title may reveal the clear intent of the statute."

(Petition at p. 15) Petitioners have latched on to a headnote and are urging this Court to adopt the proposition that a publisher's phrase in a legal reference book takes precedence over the actual words of Congress. This argument is as ludicrous as it is insulting.

The intent and purpose of the Relief Act is undisputed and was expressly recognized and followed by the Court of Appeal herein:

"To protect members of the military service who are unable to attend to their legal affairs because they are stationed away from home . . ." (153 Cal.App.3d 520, 200 Cal. Rptr. 372 (1984) (Appendix A-11))

As the Court in Carr v. United States, 422 F. 2d 1007 (4th Cir. 1970) noted, the Relief Act

"was intended to enable persons serving in the armed forces 'to devote their entire energy to the defense of the Nation' without worries and distractions which are involved in the conduct of litigation".

The Appellate Court's opinion discusses the predecessor of the Relief Act, and the initial interpretation

of it by the Court in Clark v. Mechanics American Nat. Bank, 282 F. 589 (8th Cir. 1922). Clark noted the same intent of liberally construing the Act to protect the rights at home of those in the military unable to give attention to their business matters. 153 Cal.App.3d 520, 200 Cal. Rptr. 720 (1984) (Appendix A-13)

The Appellate Court herein correctly held:

"We find no rational basis for applying section 525 of the Act to limitation periods for initiating an action but not applying it to the limitation period for bringing an action to trial . . . it is during the period between filing the complaint and bringing the action to trial that the 'worries and distractions' of civil litigation will commonly arise necessitating

the protection of section  
525 . . ."

(153 Cal.App.3d 520, 200

Cal. Rptr. 372 (1984)

(Appendix A-13 - A15)

Importantly, the Court noted:

"Thus, we conclude that tolling  
the five-year limitation period  
is entirely consistent with  
the purposes of section 525.

Indeed to hold otherwise would  
discourage persons who already  
have filed lawsuits from enlist-  
ing in the armed services."

(153 Cal.App.3d 520, 200 Cal.  
Rptr. 372 (1984) (Appendix A-15)

The court went on to note:

"Furthermore, to dismiss  
the action of a Plaintiff  
in military service for  
failure to prosecute would  
be an idle gesture in  
many cases because a second  
action by Plaintiff would  
not be time-barred by virtue  
of section 525's conceded  
applicability to statutes  
of limitation. (See Hill v.  
City and County of San Francisco  
(1969) 268 Cal.App.2d 874,

876; Billups v. Tiernan (1970)  
11 Cal.App.3d 372, 375-376.)  
This point was succinctly made  
in Cahill v. Northeast Air-  
lines, Inc. 344 N.Y. Supp.2d  
372, (1973). There, the  
court held that dismissal of  
plaintiff's negligence action  
for want of prosecution was  
properly denied where plaintiff  
was in military service and  
a second action would not  
be time-barred due to the  
tolling provision of section  
525. 'If this action were  
dismissed for want of prosecu-  
tion,' the court observed,  
'a second action by [plaintiff]  
would not be time-barred by  
the applicable Statutes of  
Limitation, by virtue of the  
tolling provisions contained  
in . . . [section 525] of the  
federal Soldiers' and Sailors'  
Civil Relief Act of 1940.  
. . . Under such circumstances  
. . . it would be an idle  
gesture to dismiss this  
otherwise dismissable action.'  
(Id. at p. 373.) Since we  
construe section 525 to toll  
the five-year limitation  
period as applied to actions  
by members of the military  
service we avoid this anomalous

result."

Petitioners' arguments never reach nor dispute this perceptive analysis. It is clear that by its decision, the Court of Appeal properly, fulfilled its inherent function of interpreting and applying statutory and case law. Estate of Madison, 26 Cal. 2d 453, 159 P2d. 630, (1945); Bennett v. Letterly, 74 Cal.App.3d 901, 141 Cal. Rptr. 582, (1977). However, Petitioners attempt to distort the Appellate decision. A prime example of this appears at page 16 of the Petition. Petitioners contend that the Appellate Court ignored "Congress' obvious intent" of the "use" of the term "statute of limitations" in § 525, and

further, blatantly create a legal fantasy as to what Congress "clearly intended" by that phrase, all the while neglecting to mention in their Petition that Congress never used the term "statute of limitations". (Public Laws, Ch. 888, § 205, 54 Stat. 1181 (Appendix B-1 )

Petitioners next erroneously assert that the Appellate decision is in conflict with a Third Circuit Court of Appeal case, Zitomer v. Holdsworth, 449 F.2d 724 (3rd Cir. 1971). The facts in Zitomer are not only totally dissimilar to this case, but Petitioners have also improperly articulated its holding. In Zitomer, the Plaintiff, who was

not in the military, moved for a continuance of trial based on the fact that the Defendant was on duty in the military. The Court dismissed for lack of prosecution. Plaintiff resisted, contending that §525 justified his failure to prosecute. The Court of Appeal found that §525 was not applicable to the Plaintiff; the Court made no finding as to whether §525 may have been applicable to the Defendant serviceperson, had he attempted to invoke it. The Plaintiff in Zitomer did not fail to prosecute his action because he was in the military, but, instead tried to justify his failure by asserting Defendant's period of military

service as a "sword" to bar dismissal. (The Court noted that the Defendant had not availed himself of the Act's provisions; there would obviously be no reason for him to do so, since it would be in Defendant's best interest to let the limitation period run and have the case dismissed). In the matter herein, Respondents properly invoked the Relief Act's provisions since Respondent, VICTOR BUTTLER, was in the military. Petitioners' attempt to skewer facts and re-assemble the law must not be allowed. The instant Appellate decision is not in direct conflict with Zitomer, as Petitioners allege, but is a proper and non-conflicting

opinion.

B.

The Appellate Court's interpretation of §521 of the Relief Act is not in conflict with other Federal Court of Appeal decisions.

The Court of Appeal has interpreted the Relief Act in a manner fully consistent with both the well-settled purposes of the Relief Act and the inherent purposes of California Code of Civil Procedure, § 583 (b) (Appendix D-1 ), including its judicially implied "impossible, impracticable and futile" exception. The true nature and intent of Code of Civil Procedure, § 583 (b) has

long been recognized by California Courts. As the California Supreme Court has stated:

"The purpose of [C.C.P. § 583(b)] is plain: to prevent avoidable delay for too long a period. It is not designed arbitrarily to close the proceeding at all events in five years . . . and, as we have already pointed out, despite the mandatory language, implied exceptions are recognized." Christin v. Superior Court, 9 Cal.2d 526, 71 P2d 205 (1937) (Emphasis in original)

The plain intent of C.C.P. § 583 (b), and more particularly of the "impossible and futile" exception, is not to set up an arbitrary five year limitation period, but rather, to insure that cases are brought to trial within a reasonable time in light of all the circumstances in each

case. Fanin Corp. v. Superior Court.  
36 Cal.App.3d 745, 111 Cal.Rptr. 920  
(1974). There are any number of  
"circumstances" which make bringing  
a case to trial within five years  
"impossible, impracticable or  
futile". The Court of Appeal's  
decision in this case acknowledged  
that the protections afforded  
Respondent, VICTOR BUTTLER, by the  
Relief Act made bringing the case  
to trial "objectively impossible".  
(153 Cal.App.3d 520, 200 Cal.Rptr. 372  
(1984) (Appendix A-21)

Petitioners contend that there  
is "confusion which surrounds  
application of the Relief Act in  
California". (Petition, page 21) No

such confusion exists in the Courts' decisions, and an analysis of Petitioners' cited cases reveal that the only confusion regarding the Relief Act is Petitioners'.

The Appellate Court noted:

"Our Supreme Court has interpreted section 521 as mandating a postponement of trial unless the court is satisfied that by going forward the ability of the person in military service to prosecute or defend would not be materially affected. (Pacific Greyhound Lines v. Superior Court (1946) 28 Cal. 2d 61, 67; see also, Rauer's Law, supra, 76 Cal.App.2d at p. 858; Kaiser Foundation Hospitals v. Superior Court (1960) 185 Cal.App.2d 177, 182; and Boone v. Lightner (1942) 319 U.S. 561, 575." (153 Cal.App.2d 520, 200 Cal. Rptr. 720 (1984) (Appendix A-20)

Pacific Greyhound has been consistently acknowledged and followed by

California Courts; there simply is no "confusion" as Petitioners contend. Since Petitioners cannot dispose of the controlling case of Pacific Greyhound, they change tactics and attempt to analyze California Code of Civil Procedure, § 583 (b).

This is an issue which is improperly raised herein, since the practice of the U.S. Supreme Court is to defer to the determination of the Court of Appeal of state law. Cost v. Ash, 422 U.S. 66, 95 S.Ct. 2080, 45 L.Ed. 2d 26 (Ca 1975); U.S. v. Thirty Seven Photographs, 402 U.S. 363, 91 S.Ct., 1400, 28 L.Ed 2d (Cal 1971) reh denied, 403 U.S. 924. In any event, the Court of Appeal properly

interpreted C.C.P., §583(b), and it needs no review. (See Respondents' Brief in Opposition, p.21-25 supra and 153 Cal.App.3d 520, 200 Cal.Rptr. 372 (1984) (Appendix A18 - A22)

In a last ditch effort to argue the instant decision is in "conflict with Federal Circuit Court of Appeal opinions", Petitioners cite three cases which do not help them.

(Petition, p. 29-30) The holdings and rationales of Gross v. Williams, et al. 149 F2d 84 (8th Cir. 1945), Tabor v. Miller, 389 F2d 645 (3rd Cir 1968), and Crowder v. Capital Greyhound Lines, 169 F2d 674 (D.C. Cir. 1948) confirm Respondents' argument and are consistent with the Opinion herein, that a trial

court only has discretion to deny a stay under § 521 where it finds the serviceperson's rights will not be "materially affected" by his or her absence from the proceedings. The facts of this case demonstrate that Respondents' rights were in fact materially affected by VICTOR BUTTLER'S military service and Respondents were entitled to the protection of § 521. The fact remains that the Appellate Court's opinion is proper.

C.

A Formal Application of a Stay Order does not preclude a court from granting a stay.

The California Supreme Court in Pacific Greyhound, supra stated:

"Here no application for a stay was actually made to the court but the failure to apply for a stay did not preclude the court, upon the motion to dismiss, from determining whether, under all the facts and circumstances, a stay would have been mandatory if it had been applied for."  
(Pacific Greyhound, surpa,  
at P. 67)

In Kaiser Foundation Hospitals  
v. Superior Court, 185 Cal.App.2d  
177, 8 Cal. Rptr. 181, (1960), the  
Court of Appeal reaffirmed the  
Supreme Court's holding in Pacific  
Greyhound, supra:

"Neither in the Greyhound  
case nor in this case was there  
any application for a stay but  
. . . the failure to apply  
for a stay did not preclude  
the court, upon the motion to  
dismiss from determining  
whether, under all the facts  
and circumstances, a stay

would have been mandatory if  
it had been applied for . . .  
(Kaiser, supra, at p. 180)

See also Rauer's Law Etc.

v. Higgins, 76 Cal.App.2d 854, 174  
P2d 450 (1946)

The Appellate Decision herein,  
in accordance with the settled  
principles of law, states:

"Here no application for  
a stay was actually made but  
that does not preclude the  
court from considering, for  
purposes of §583, subdivision  
(b), whether a stay would have  
been mandatory if it had  
been applied for (Pacific  
Greyhound, supra, Rauer's Law,  
supra.) (153 Cal.App.3d 520,  
200 Cal. Rptr. 372, (1985)  
(Appendix A21)

The record reflects that  
Respondent, VICTOR BUTTLER'S,  
absence, due to his active duty in

the military, made the prosecution of this case impossible, impractical and futile, and a stay would have been mandatory, if it had been applied for. Nevertheless, the law is clear that the application for the stay is not required, and Petitioners' assertion to the contrary goes against the law.

D.

Code of Civil Procedure,  
§583(b) was tolled for the  
period Respondent, VICTOR  
BUTTLER, was in the Navy.

Petitioners' arguments demonstrate that they do not understand the meaning of "tolling". When Respondent, VICTOR BUTTLER, was in the U.S.

Navy, the time periods involved in his case were tolled, the clock was stopped. Specifically, for two years and seven months, the length of VICTOR BUTTLER'S military service, all time periods were suspended.

Shortly after VICTOR BUTTLER got out of the Navy, the time period began again, --the clock started-- and the two years and seven months are then added onto any time limitation.

Thus, when Petitioners' Motion to Dismiss was brought in January, 1982 Even though VICTOR BUTTLER was not in the military at that time, the tolling period while he was in the service still existed. Yet, Petitioners purport that after a serviceperson's

discharge, the tolling periods are wiped out. This illogical position defies legal understanding. A period of two years and seven months was tolled herein, and that suspended time period remains valid and effective. Petitioners cannot retroactively start the clock that the law rightfully holds has stopped.

E.

The Appellate Court's Decision  
Correctly interpreted Federal  
Law.

The Appellate Court's ruling abrogates neither the function of Section 521 of the Act, nor the purposes of Section 583 (b); it merely recognizes the established principles of the

Relief Act. California Courts may still grant or deny motions to dismiss actions where servicepersons are parties. The Court's ruling specifically applies to protect servicepersons by making the tolling of the five year provision of Section 583 (b) mandatory with respect to servicepeople who are on active duty and thus unable to protect their rights themselves. To deny protection to those people who give up years of their own lives to serve our Nation would be a grave injustice. Petitioners' contentions as to the alleged impact of the instant decision are unfounded and based upon improper hypotheticals. It has long been held that this Court will not

decide such unnecessary hypothetical matters and Petitioners' argument must fail. Thorpe v. Housing of City of Durham, 393 U.S. 268, 89 S.Ct. 518, L.Ed.2d 474 (1969)

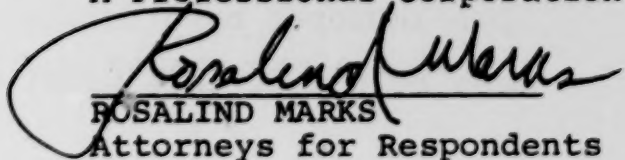
CONCLUSION

Based on each and every of the foregoing reasons, Respondents respectfully submit that the decision of the California Court of Appeal was proper, and in accordance with the law, and it should not be further reviewed.

DATED: Sept. 17, 1984

Respectfully submitted,

ISAAC & MARKS  
A Professional Corporation

  
ROSALIND MARKS  
Attorneys for Respondents

APPENDIX A

OPINION OF THE COURT OF APPEAL OF  
THE STATE OF CALIFORNIA  
SECOND APPELLATE DISTRICT

A-1

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL  
OF THE STATE OF CALIFORNIA  
SECOND APPELLATE DISTRICT  
DIVISION SEVEN

LEROY BUTTLER, et al.,	)	2d Civ. 68467
	)	
Plaintiffs and	)	(LASC No.
Appellants.	)	C181 072)
	)	
vs.	)	
	)	
CITY OF LOS ANGELES,	)	
et al.,	)	
	)	
Defendants and	)	
Respondents.	)	
	)	

---

APPEAL from an order of the  
Superior Court of Los Angeles  
County. Arthur Baldonado, Judge.  
Reversed.

Isaac & Marks and Godfrey  
Isaac and Rosalind Marks for Plaintiffs  
and Appellants.

A-2

Ira Reiner, City Attorney,  
John T. Neville, Senior Assistant  
City Attorney, Richard M. Helgeson,  
Assistant City Attorney and Katherine  
J. Hamilton, Deputy City Attorney  
for Defendants and Respondents.

This is an appeal from an  
order dismissing plaintiffs' action  
for failure to bring the case to  
trial within five years of its  
commencement and from an order  
denying plaintiffs' motion to  
vacate the order of dismissal. For  
the reasons set forth below, we  
reverse the dismissal order. We do  
not reach the order denying the  
motion to vacate.

FACTS AND PROCEEDINGS BELOW

On November 19, 1976, plaintiff Victor Buttler, his brother Donald, and their father Leroy filed suit against the defendants City of Los Angeles and eight of its police officers. Their complaint alleged that plaintiffs had been the victims of false arrest, false imprisonment, assault and battery by the defendant officers.

Plaintiffs began to prosecute their action in a diligent manner. One week after defendants answered the complaint plaintiffs filed their At-Issue Memorandum. Plaintiffs responded to interrogatories propounded by defendants in May, 1977 and in

August, 1977 propounded their own interrogatories to defendant.

The superior court issued its first notice of eligibility to file a certificate of readiness in March 1979. By that time plaintiff Victor Buttler was on active duty in the United States Navy stationed on board a ship in Rota, Spain.

Victor Buttler commenced active military service on November 6, 1978. He did not appear in response to defendants' notices of deposition in December 1978 and February 1980.

In January 1982 the matter not having been brought to trial within five years, defendants moved to

dismiss pursuant to Code of Civil Procedure section 583(b). Plaintiffs resisted this motion on the ground that plaintiff Victor Buttler had been on active duty in the United States Navy between November 1978 and June 1981 and that the five-year period was suspended as to all three plaintiffs during Victor Buttler's military service by reason of the Soldiers' and Sailors' Civil Relief Act (hereafter referred to as the "Act".)

At the hearing on defendant's motion to dismiss, the trial court made a tentative ruling denying the motion provided that plaintiffs move to specially set the matter

for trial within sixty days. This ruling was made conditional on whether the Act applied to plaintiffs as well as defendants. The court requested supplemental points and authorities on this issue. After receiving the parties' supplemental briefs, the trial court granted defendants' motion to dismiss. Plaintiffs' motions for reconsideration and for relief on the ground of their mistake of law were denied. Plaintiffs also requested a Statement of Position from the court regarding, inter alia, the application of the Act to plaintiff Victor Buttler. The court did not respond to this

request.<sup>1/</sup>

DECISION

We first consider whether the trial court erred in dismissing Victor Buttler's action. The Act provides in relevant part:

"The period of military service shall not be included in computing any period now or hereafter to be limited by any law, regulation, or order for the bringing of any action or proceeding in any court . . . by or against any person in military service or by or against his heirs, executors, administrators, or assigns. . . ."  
(50 U.S.C. App. § 525.)

---

<sup>1/</sup>We recognize that section 632 of the Code of Civil Procedure by its terms only applies to the trial of a question of fact. Nevertheless it would have been helpful if the trial court had clarified the ambiguity in the reasoning behind its order. We  
(Continued)

Application of the tolling provision of Section 525 of the Act is mandatory as to any person in military service; it does not require a showing of prejudice by reason of such service. (Syzemore v. County of Sacramento (1976) 55 Cal.App.3d 517, 322-524.)

---

1/ (Continued)

cannot determine, for example, whether the trial court believed that the Soldiers' and Sailors' Civil Relief Act does not apply to military personnel who are plaintiffs, or believed that the Act does not apply to Victor Buttler. Nor can we determine, in referring to the Act, the court was referring to sections 525 or 521 or both. Ordinarily the trial court's reasoning in granting or denying a motion is irrelevant but, as we explain infra, the way in which the case interpreted the Act does make a difference in this case with respect to the dismissal against appellants Donald and Leroy Buttler.

The only question is whether section 525 suspends the running of time limitations that are not statutes of limitations but which govern procedures in actions already brought such as the five-year limitation contained in section 583, subdivision (b) of the Code of Civil Procedure. We have found no California case directly on point.<sup>2/</sup>

---

<sup>2/</sup> in Rauer's Law Etc. Co. v. Higgins (1946) 76 Cal.App.3d 854, the plaintiff contended that the five-year limitation period was tolled by section 525 of the Act. The court did not decide this question because it found that that section did not apply to suits such as plaintiff's filed before the passage of the Act. (Id., at pp. 857-858.)

In Thornley v. Superior Court (1949) 89 Cal.App.2d 662, the defendant moved to dismiss the action on the ground that he had not been served with  
(Continued)

From our examination of the purposes of the Act and the logical consequences of its language, we have concluded that section 525 tolls the five-year limitation period of Code of Civil Procedure section 583, subdivision (b) as to actions brought by members of the military service.

---

2/ (Continued)

a summons within three years of the commencement of the action. (Code Civ. Proc., § 581, subd. (a).) The plaintiff argued that the time for service was tolled by section 525 while defendant was in the military. The court declined to construe section 525 as suspending the mandatory requirement of service noting that section 525 "was enacted for the benefit of one in the military services and that it is not available beyond its express terms to his adversary to excuse his non-compliance with the mandatory provisions of  
(Continued)

The purpose of the tolling provisions of the Act is to protect members of the military service who are unable to attend to their legal affairs because they are stationed away from home in active service or recovering from injuries incurred in active service. (Cruz v. General Motors Corporation (S.D.N.Y. 1970) 308 F.Supp. 1052, 1057.) As one court noted, the Act "was intended to enable persons serving in the armed forces 'to devote their entire energy to the

---

2/ (Continued)

the state "statute". (Id., at p. 644.) The policy considerations in the instant case are significantly different from those in Thronley and compel a different result.

defense needs of the Nation without the worries and distractions which are involved in the conduct of litigation." (Carr v. United States (4th Cir. 1970) 422 F.2d 1007, 1012.) And, in interpreting the predecessor of the current Act, it was stated that its "purpose [is] to extend protection to persons in military service in order to prevent injury to their civil rights during their terms of service and to enable them to devote their entire energy to the military needs of the nation . . . A statute of this nature should be liberally construed in favor of the rights of the man engaged in military service, absorbed

by the exacting duties required of him, and unable to give attention to matters of private business."

(Clark v. Mechanics' American Nat. Bank, (8th Cir. 1922) 282 F. 589, 591.)

We find no rational basis for applying section 525 of the Act to limitation period for bringing an action to trial. The language of section 525 does not use the words "statute of limitation" although this phrase was surely in the lexicon of Congress in 1940.<sup>3/</sup> The

---

<sup>3/</sup>The phrase "statute of limitation" appears in a headnote to section 525 of West's United States Code Annotated  
(Continued)

language Congress chose, "any period . . . limited by any law . . . for the bringing of any action or proceeding in any court . . . ," is broad enough to include a law requiring dismissal unless an "action is brought to trial within five years . . . ." Code Civ. Proc., § 583, subd. (b).) Moreover, it is during the period between filing the complaint and bringing the action to trial that the

---

3/ (Continued)

(1981) at page 291. The phrase does not appear in the Act itself. (See Public Laws, Ch. 888, § 205, 54 Stat. 1181.)

"worries and distractions" of civil litigation will commonly arise necessitating the protection of section 525. Thus, we conclude that tolling the five-year limitation period is entirely consistent with the purposes of section 525.

Indeed to hold otherwise would discourage persons who already have filed lawsuits from enlisting in the armed services. To serve their country they would have to risk dismissal of their actions for want of prosecution during a time they may not be in a position to diligently pursue those lawsuits.

Furthermore, to dismiss the action of a plaintiff in military

service for failure to prosecute would be an idle gesture in many cases because a second action by that plaintiff would not be time-barred by virtue of section 525's conceded applicability to statutes of limitation. (See Hill v. City and County of San Francisco (1969) 268 Cal.App.2d 784, 876; Billups v. Tiernan (1970) 11 Cal.App.3d 372, 375-376.) This point was succinctly made in Cahill v. Northeast Airlines, Inc. (1973) 344 N.Y.Supp.2d 372. There, the court held that dismissal of plaintiff's negligence action for want of prosecution was properly denied where plaintiff was in military service and a second action would not be time-barred due

to the tolling provision of section 525. "If this action were dismissed for want of prosecution," the court observed, "a second action by [plaintiff] would not be time-barred by the applicable Statutes of Limitation, by virtue of the tolling provisions contained . . . [section 525] of the federal Soldiers' and Sailors' Civil Relief Act of 1940 . . . . Under such circumstances . . . it would be an idle gesture to dismiss this otherwise dismissable action." (Id. at p. 373.) Since we construe section 525 to toll the five-year limitation period as applied to actions by members of

the military service we avoid this anomalous result.

Our holding that section 525 tolls the period for bringing an action to trial only applies to Victor Buttler. As to him the time for bringing his claim to trial is tolled during the period he was in active military service. The Act does not apply directly to co-plaintiffs Leroy and Donald Buttler who were not in military service during the course of this litigation. (Wanner v. Glen Ellen Corporation (D. Vt. 1974) 373 F.Supp. 983, 986.)

However, during the time he was on active duty and for sixty

days thereafter, Victor Buttler also was entitled to the protection of section 521 of the Act which provides in relevant part, "At any stage thereof any action or proceeding in any court in which a person in military service is involved, either as plaintiff or defendant, during the period of such service or within sixty days thereafter may, in the discretion of the court in which it is pending, on its own motion, and shall, on application to it by such person or some person on his behalf, be stayed as provided in this Act . . . unless, in the opinion of the court, the ability of plaintiff to prosecute the

action or the defendant to conduct his defense is not materially affected by reason of his military service." (50 U.S.C. App. § 521.)

Our Supreme Court has interpreted section 521 as mandating a postponement of trial unless the court is satisfied that by going forward the ability of the person in military service to prosecute or defend would not be materially affected. (Pacific Greyhound Lines v. Superior Court (1946) 28 Cal.2d 61, 67; see also, Rauer's Law, supra, 76 Cal.App. 2d at p. 858; Kaiser Foundation Hospitals v. Superior Court (1960) 185 Cal.App.2d 177, 182; and Boone v. Lightner (1942) 319 U.S. 561, 575.

Here no application for a stay was actually made but that does not preclude the court from considering, for purposes of section 583, subdivision (b), whether a stay would have been mandatory if it had been applied for. (Pacific Greyhound Lines v. Superior Court, supra, 28 Cal.2d at p. 67; Rauer's Law, supra, 76 Cal.App.2d at p. 858.) If Victor Buttler could have invoked section 521 of the Act to block the other plaintiffs from going to trial then, as a matter of law, it would have been objectively impossible for them to prosecute their actions while he was in military service. Thus it may have been "futile" for

the other plaintiffs to have sought a trial while Victor was in the service since he would have been entitled to stay that trial.

It does not appear from the record that the trial court considered the possibility Donald and Leroy Buttler's prosecution of their claims in his absence could be prejudicial to Victor Buttler's ability to prosecute his action. The focus of the argument in the trial court was on whether Victor Buttler's absence was prejudicial to Donald and Leroy Buttler. Moreover, the trial court's tentative decision that it would overrule the defendant's motion if the Act applied to plaintiffs as well as to defendants

coupled with its subsequent granting of the defendants' motion to dismiss is some indication that the court did not believe the Act applied to plaintiffs and, therefore, did not consider the prejudice to Victor Buttler if his co-plaintiffs had proceeded to try their claims.

We recognize trial courts have wide discretion in weighing the factors excusing compliance with 583 (b) and ordinarily defer to their decision. However, the absence of the statement of decision requested by appellants makes it impossible for this court to ascertain how much the trial court's rationale for dismissing Donald and Leroy's actions would be disturbed by

our holding that 50 U.S.C. 525 tolled Victor's closely related action while he was in the service and our observation that under 50 U.S.C. 521 Victor may have been entitled to stay the other actions as well as his own because of prejudice to him from a separate trial of those lawsuits. We are reversing the order of dismissal as to Leroy and Donald Buttler so that the trial court can reconsider the matter in this light. In doing so, we do not mean to dictate how the trial court exercises its discretion as to the dismissal of Donald and Leroy Buttler's actions. We only direct that it conduct an examination of this new configuration of factors and then apply its

A-25

discretion to that altered set of facts.

DISPOSITION

The order dismissing the action is reversed and the case is remanded for further proceedings consistent with this opinion.

CERTIFIED FOR PUBLICATION

---

JOHNSON J.

We Concur:

---

SCHAUER, P.J.

---

THOMPSON J.

APPENDIX B

CHAPTER 888, SECTION 205  
(SOLDIER'S & SAILOR'S CIVIL  
RELIEF ACT OF 1940)

B-1

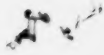
Chapter 888, Section 205  
(Soldier's & Sailor's Civil  
Relief Act of 1940)

The period of military service shall not be included in computing any period now or hereafter to be limited by any law for the bringing of any action by or against any person in military service or by or against his heirs, executors, administrators or assigns whether such cause of action shall have accrued prior to or during the period of such service.

APPENDIX C

SECTIONS 525 and 521

SOLDIERS' AND SAILORS' CIVIL RELIEF  
ACT, 50 U.S.C. App. §§ 501, et seq.



§525. Statutes of limitation as  
affected by period of service

The period of military service shall not be included in computing any period now or hereafter to be limited by any law, regulation, or order for the bringing of any action or proceeding in any court, board, bureau, commission, department or other agency of government by or against any person in military service or by or against his heirs, executors, administrators, or assigns, whether such cause of action or the right or privilege to institute such action or proceeding shall have accrued prior to or during the period of such service, nor shall any part of such period which occurs after the

date of enactment of the Soldiers' and Sailors' Civil Relief Act Amendments of 1942 be included in computing any period now or hereafter provided by any law for the redemption of real property sold or forfeited to enforce any obligation, tax, or assessment.

§521. Stay of proceedings where  
military service affects  
conduct thereof

At any stage thereof any action or proceeding in any court in which a person in military service is involved, either as plaintiff or defendant, during the period of such service or within sixty days thereafter, may, in the discretion of the court in which

it is pending, on its own motion, and shall, on application to it by such person or some person on his behalf, be stayed as provided in this Act [sections 501 to 591 of this Appendix], unless, in the opinion of the court, the ability of plaintiff to prosecute the action or the defendant to conduct his defense is not materially affected by reason of his military service.

APPENDIX D

CALIFORNIA CODE OF  
CIVIL PROCEDURE §583

CALIFORNIA CODE OF CIVIL PROCEDURE

§583        Dismissal; lack of prosecution;  
             failure to bring action to trial

(b) Any action heretofore or  
hereafter commenced shall be dismissed  
by the court in which the same shall  
have been commenced or to which it may  
be transferred on motion of the  
defendant, after due notice to plain-  
tiff or by the court upon its own  
motion, unless such action is brought  
to trial within five years after the  
plaintiff has filed his action, except  
where the parties have filed a stipula-  
tion in writing that the time may be  
extended.